No. 77-466

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 558 F. 2d 1172.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1977. On August 22, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 25, 1977 (a Sunday), and the petition was filed on September 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2314, which proscribes the knowing transportation in interstate commerce of a security taken by fraud, requires that the security be taken directly from the victim of the fraud.

2. Whether the evidence showed that petitioner transported "counterfeit" securities, within the meaning of 18 U.S.C. 2314.

3. Whether petitioner's indictment and conviction were obtained through abuses of the grand jury process or violations of Internal Revenue Service regulations.

4. Whether petitioner was denied his right to a speedy trial under the Sixth Amendment or the Speedy Trial Act of 1974.

5. Whether the district court's instructions to the jury were erroneous.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of interstate transportation of counterfeit securities and securities taken by fraud, in violation of 18 U.S.C. 2314 and 2.[1] He was sentenced to one year's imprisonment on each count, the terms to run concurrently.

The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 6a-7a), showed that in 1970 petitioner and his brothers owned a number of real estate and development companies in Northern Virginia. In October 1970, petitioner pledged all of the stock in one of these companies, Zachary Taylor Corp., to Jerome S. Murray as collateral for the satisfaction of a commercial obligation. The stock certificates, numbered 1, 2 and 3, were delivered to Murray's agent, who placed them in a safe deposit box in a bank. On June 28, 1971, at a time when the Pomponio organization was facing

[1]The jury acquitted petitioner's brothers, co-defendants Peter and Paul Pomponio, on the same charges.

critical cash flow problems, petitioner went to Philadelphia, Pennsylvania, and pledged the same stock in the Zachary Taylor Corp. to John McShain, without notifying or obtaining a release from Murray. In order to convince McShain that he was receiving 100 percent of the corporation's stock, as he had been promised, petitioner bought a new stock book and labelled the pledged stock certificates as certificates 1, 2 and 3 in Zachary Taylor Corp.

In return for the stock, McShain endorsed a promissory note for $3,800,000 that had been executed by petitioner and his brothers payable to the Continental Bank of Philadelphia. McShain's endorsement was essential for the loan to the Pomponios because they were not known to the bank (Tr. 523). The bank thereafter issued petitioner a cashier's check for $2,000,000 and held the balance of the loan in an escrow account. Petitioner returned to Virginia with the cashier's check.

The first count of the indictment was based on the interstate transportation of the cashier's check received by petitioner as a result of his fraudulent procurement of McShain's endorsement on the promissory note. The second count was based on petitioner's transmission from Virginia to Pennsylvania of counterfeit securities in the Zachary Taylor Corp. for delivery to McShain.

ARGUMENT

1. 18 U.S.C. 2314 makes it a crime to transport in interstate commerce "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." Petitioner contends (Pet. 17-19) that this statute requires that the transported security must have been taken directly from the defrauded person and that

the evidence in this case showed that he obtained the check lawfully from the Continental Bank.

This argument, however, runs contrary to this Court's interpretation of Section 2314 and would defeat the congressional purpose in enacting the statute. This purpose was explained in *United States* v. *Sheridan*, 329 U.S. 379, 384 (footnote omitted):

> Congress had in mind preventing further frauds or the completion of frauds partially executed. But it also contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent. This was indeed one of the most effective ways of preventing further frauds as well as irrevocable completion of partially executed ones.

Accordingly, the statute has been construed broadly to reach "all ways by which an owner is wrongfully deprived of the use or benefits of the use of his property. * * * Congress by the use of the broad terms was trying to make clear that if a person was deprived of his property * * * by false pretense, by fraud, swindling, or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime." *Lyda* v. *United States*, 279 F. 2d 461, 464 (C.A. 5). See also *United States* v. *Bottone*, 365 F. 2d 389 (C.A. 2), certiorari denied, 385 U.S. 974; *United States* v. *Leggett*, 292 F. 2d 423 (C.A. 6), certiorari denied, 368 U.S. 914.

Petitioner fraudulently induced McShain to endorse a promissory note, which he then executed with the Continental Bank. As a direct result of the fraud

perpetrated on McShain, and in reliance upon McShain's endorsement that made him secondarily liable on the note, the bank issued a cashier's check, which petitioner immediately transported in interstate commerce. In light of this Court's broad interpretation of Section 2314 in *United States* v. *Sheridan, supra,* the court of appeals correctly determined that petitioner could not escape liability under the statute merely by utilizing an innocent third party bank to convert fraudulently obtained securities into checks. As Judge Learned Hand observed in *United States* v. *Walker*, 176 F. 2d 564, 566 (C.A. 2), certiorari denied, 338 U.S. 891, a case in which the defendant transported travelers' checks obtained from the proceeds of a mortgage he had fraudulently induced his wife to execute:

> We are by no means prepared to hold that, whenever any one fraudulently obtains the property of another, the proceeds are not also "taken feloniously by fraud," into whatever form he may convert them. That is the view of equity, and it is impossible to find any reason in the purpose of the statute to distinguish between the original property and its substitute.

See also *United States* v. *Caci*, 401 F. 2d 664, 672-673 (C.A. 2), certiorari denied, 394 U.S. 917.

This construction of the statute conforms with the congressional purpose and avoids what would otherwise be a gaping loophole in legislation that was intended to keep the channels of interstate commerce free from securities that have been fraudulently obtained.[2]

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[2]The recent decision in *United States* v. *Poole*, 557 F. 2d 531 (C.A. 5), supports this conclusion. There, a defendant in Louisiana fraudulently induced a Louisiana company to purchase non-existent machinery, deposited the company's check into his bank account, and

2. Petitioner contends (Pet. 20-21) that the stock certificates in the Zachary Taylor Corp. that he sent to McShain were not "counterfeit," within the meaning of Section 2314. In support of this contention, petitioner relies upon the fact that the charter and by-laws of the corporation allowed him, as a corporate officer, to issue additional stock (Pet. 8).

The power to issue genuine stock, however, did not entitle petitioner also to issue counterfeit stock, and the evidence clearly showed that petitioner did not treat the certificates as genuine. As the court of appeals pointed out (Pet. App. 7a), petitioner "purchased another stock book and simulated the original certificates pledged to Murray by numbering the new certificates 1, 2, and 3," rather than forwarding to McShain the preprinted certificates 4, 5 and 6 in the corporation's genuine stock book. Moreover, petitioner backdated the certificates to January 1970 (the date on the certificates pledged to Murray) rather than dating them June 1971, when he claims lawfully to have issued them (App. 810a-815a).[3] This conduct plainly fell within the frequently approved definition of counterfeit, "an imitation of a genuine

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then wrote a check for the same amount and sent it to a Texas bank. The court of appeals held that since there were sufficient surplus funds in the defendant's account to cover the check he sent to Texas, without applying the proceeds from the check fraudulently obtained from the company, the defendant did not violate 18 U.S.C. 2314. Significantly, the court observed that if the defendant had opened up a new account with the fraudulently acquired check and had then transported a check from the new account in interstate commerce, he could have been convicted of violating Section 2314 because in those circumstances there would only have been an inconsequential change in the form of the fraudulently obtained security (557 F. 2d at 535 n. 7).

[3]"App." refers to the joint appendix in the court of appeals.

document having a resemblance intended to deceive and be taken for the original." *United States* v. *Anderson*, 532 F. 2d 1218, 1224 (C.A. 9), certiorari denied, 429 U.S. 839. See *United States* v. *Morrow*, 537 F. 2d 120 (C.A. 5). Nor is petitioner's position aided by *Gilbert* v. *United States*, 370 U.S. 650, where the Court concluded that the word "forges" in 18 U.S.C. 495 was intended to have its common law meaning.

Petitioner's argument that the stock was not counterfeit because Murray retained no legal interest in the original certificates is equally unpersuasive. Murray in fact acquired legal title to the stock under the express terms of the pledge agreement. That agreement provided that it covered 100 percent of the issued and outstanding stock of the Zachary Taylor Corp. (App. 832a, 843a), namely certificates numbered 1, 2 and 3, and petitioner warranted that he would not issue any additional shares of stock in the corporation without Murray's written consent (App. 846a). The certificates were placed in a safe deposit box, where they remained until September 1972 (Tr. 212). Petitioner did not regain possession of the certificates or obtain an oral or written release from Murray before transferring simulated stock to McShain. Therefore, even though petitioner was an officer of the corporation, he had no authority to issue new stock by virtue of the pledge agreement.[4]

Finally, petitioner's alternative assertion that Murray never received legal title to the certificates because they were held by an escrow agent is also without merit. The parties agreed that the pledge would be governed by the

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[4]Indeed, petitioner testified that he operated under the belief that he could not issue new stock in the corporation unless Murray agreed to release the documents (Tr. 1922-1923).

Uniform Commercial Code of Virginia (App. 844a). Sections 8.9-304 and 8.9-305 of the Virginia U.C.C. (1965) provide that a fully perfected security interest in instruments attaches when the instruments are "held by a bailee, [and] the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest." Murray's interest in the stock thus attached at the time of the execution of the pledge agreement, and that interest was perfected when Murray's agent received the stock, notwithstanding the failure to deliver the certificates to Murray. Petitioner therefore possessed no legal authority under the agreement to pledge the stock to McShain.[5]

3. Contrary to petitioner's assertions (Pet. 3-7, 10-14), his indictment and conviction were not obtained through violations of Internal Revenue Service regulations or abuses of the grand jury process.

a. Petitioner's contention that I.R.S. regulations were violated, a contention that the government has always vigorously contested, is predicated solely upon an "offer of proof" (Pet. App. E) in the district court, in which petitioner alleged that the government used the Civil Division of the I.R.S. as "a cloak for a criminal investigation" (Pet. 10).

Petitioner had previously been convicted of violating 18 U.S.C. 2314, 1341 and 1343, but that conviction was reversed. *United States* v. *Pomponio*, 517 F. 2d 460 (C.A.

[5]Petitioner urges that the decision below conflicts with *In re Dolly Madison Industries, Inc.*, 351 F. Supp. 1038 (E.D. Pa.), affirmed without opinion, 480 F. 2d 917 (C.A. 3). In *Dolly Madison*, however, an escrow agreement specifically provided for redelivery of the stock to the seller in the event of a default by the buyer. Here, the pledge agreement was unequivocal, and Murray was vested with title from the moment his agent took possession of the stock. See *Appeal of Copeland*, 531 F. 2d 1195, 1201-1202 (C.A. 3).

4). At the former trial, petitioner's co-defendant made a pre-trial motion to dismiss the indictment, asserting that the government had violated I.R.S. regulations by conducting a criminal investigation under the guise of a civil tax audit. The trial judge (Judge Lewis) held an evidentiary hearing on the claim, at which the defendants presented testimony from I.R.S. agents who had been directly involved in the investigation, and denied the motion. Petitioner's counsel joined in the examination of the agents. On retrial, petitioner again raised the I.R.S. issue in a pre-trial motion to dismiss the indictment, which the government opposed. Judge Bryan, who presided over the second trial, declined to hear additional evidence on the motion, incorporated the evidence received in the prior hearing, and adopted Judge Lewis's ruling.[6] Petitioner then filed his offer of proof (Pet. App. E) and renewed his motion to dismiss the indictment. The court adhered to its ruling and denied the motion.

The district court acted well within its discretion in incorporating the record from the prior hearing and the ruling of Judge Lewis on the identical legal issue between the same parties and in refusing to hold a further evidentiary hearing based on a totally conclusory offer of proof. Cf. *United States* v. *White*, 514 F. 2d 205, 207-208 (C.A. D.C.); *United States* v. *Cohen*, 489 F. 2d 945, 952 (C.A. 2). Indeed, petitioner has not mentioned, much less contested, any of the evidence or testimony that was received at the former hearing. Morever, petitioner's

[6]Petitioner argues that the district court should not have denied his motion on the basis of the former evidentiary proceeding because the original motion to dismiss the indictment had been made by a co-defendant at the former trial. It is clear from the transcript of that hearing (App. 64a-105a), however, that although the motion had been made by one co-defendant, each of the defendants joined in the motion.

offer of proof consisted of nothing more than an unsubstantiated narrative, unaccompanied by affidavits or other evidentiary materials, and hardly supports his present claim that the evidence at the former hearing was "significantly more limited than the offer of proof herein" (Pet. 11).

b. Petitioner contends (Pet. 11-12) that the grand jury's function was abused by governmental misconduct in the issuance of subpoenas for petitioner's financial records. Again relying upon his conclusory "offer of proof," petitioner asserts that the government permitted agents from the I.R.S. Intelligence Division to have access to documents subpoenaed by the grand jury. Specifically, although in May 1972 the government obtained an order from the district court, pursuant to Rule 6(e), Fed. R. Crim. P., to allow I.R.S. agents to review these documents, petitioner claims that the agents had been given access to the materials for four months prior to the issuance of the order.

Petitioner's allegations were the subject of an evidentiary hearing in his former trial, where I.R.S. agents fully explained their participation in the criminal investigation. Based on this testimony, the trial judge rejected petitioner's claims. This essentially factual issue does not warrant further review. We note, however, that utilization of the services of expert government personnel to assist the grand jury in its inquiries has repeatedly been recognized as legitimate when dealing with allegations involving corporate or financial crimes, even in the absence of express judicial authorization. See, *e.g.*, *Coson* v. *United States*, 533 F. 2d 1119, 1120-1121 (C.A. 9); *United States* v. *Evans*, 526 F. 2d 701, 707 (C.A. 5), certiorari denied, 429 U.S. 818.[7]

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[7]This rule has now been codified. See Fed. R. Crim. P. 6(e)(2)(A)(ii), effective October 1, 1977.

c. Petitioner contends (Pet. 12) that the government misused the grand juries in three cities within the Eastern District of Virginia and in New York City to subpoena documents from him in Alexandria, Virginia.[8] However, the United States Attorney was required to use three grand juries within the Eastern District to investigate petitioner's criminal activities because of the limited time that a grand jury was allowed to sit in any one division of the district. At the time of the events at issue in this case, Local Rule 12 of the Rules of the United States District Court for the Eastern District of Virginia provided that a grand jury would sit beginning one Monday of each month, rotating so as to sit in each of the four divisions of the district three times a year. Since a grand jury empanelled in one division has territorial jurisdiction over offenses that may have taken place in another division of the same district, the government's practice was to present its cases to the grand jury wherever it happened to be sitting that particular month, regardless of the division in which the crime allegedly occurred. See *Salinger* v. *Loisel*, 265 U.S. 224; *United States* v. *Thompson*, 251 U.S. 407. Petitioner cites no authority, and we know of none, that supports his contention that the government is guilty of misconduct if it uses several grand juries within a district to gather evidence concerning crimes that occurred in one division of the district.[9]

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[8]In July 1972, a special grand jury in the Alexandria division of the Eastern District of Virginia was empanelled to investigate petitioner and his business practices. We presume that petitioner's challenge is limited to the government's acquisition of evidence from him by subpoenas *duces tecum* issued by grand juries sitting in various other divisions of the Eastern District of Virginia prior to the empanelling of the Alexandria special grand jury.

[9]*United States* v. *Doe*, 455 F. 2d 1270 (C.A. 1), involved an allegation that a grand jury in one district was being used to obtain

4. Petitioner argues (Pet. 13-14) that he was deprived of his right to a speedy trial under the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161(e), which provides in pertinent part:

> If the defendant is to be tried again following an appeal * * *, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days * * * if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

Although petitioner's first conviction under Section 2314 was reversed and the case was remanded for a new trial (517 F. 2d 460), he nonetheless filed a petition for a writ of certiorari, claiming that the court of appeals should have ordered entry of a judgment of acquittal or dismissal of the indictment. The petition was denied on December 8, 1975. 423 U.S. 1015. Petitioner was re-indicted on January 29, 1976. He then sought and received a continuance to prepare for trial (Pet. 14). On April 9, 1976, the district court dismissed the indictment, finding that it had been returned beyond the date of expiration of the grand jury's term. The government presented its case to the next available grand jury in the district, which sat in Norfolk on April 12, 1976.[10] Petitioner was indicted by the grand jury on April 12, and his four-week trial began on May 12, 1976.

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evidence for a *trial* in another district. *In re Grand Jury Investigation of Banana Industry*, 214 F. Supp. 856 (D. Md.), involved the question whether, in the absence of a court order, evidence gathered by a grand jury in one district could be transmitted to a grand jury in another district. These cases thus have no applicability to a situation where grand juries within the *same* district are investigating the commission of a crime within one division of that district.

[10]Petitioner complains (Pet. 12-13) that the government's presentation of its case to the Norfolk grand jury in three or four hours

Petitioner did not raise a speedy trial claim in the court of appeals and therefore is precluded from raising it in this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, not only does 18 U.S.C. (Supp. V) 3163(c) provide that the sanction of dismissal of the indictment for violations of the Speedy Trial Act does not become effective until July 1, 1979 (see *United States* v. *Amendola*, 558 F. 2d 1043, 1044 (C.A. 2)), but also dismissal would be wholly inappropriate here. Petitioner added to the delay of retrial by obtaining a continuance to prepare for trial (see 18 U.S.C. (Supp. V) 3161(h)(8)(A)) and the government acted expeditiously in securing a second indictment from the next available grand jury. Moreover, petitioner has failed to allege, much less to prove, that he suffered any prejudice as a result of the government's minor delay in securing a superseding indictment. *Barker* v. *Wingo*, 407 U.S. 514, 532.

5. Finally, the district court's instructions to the jury were correct.

a. Petitioner contends (Pet. 15) that the district court impermissibly reduced the government's burden of proof by instructing the jury that it could "define reasonable doubt no better than to say it means a doubt that is based on reason and must be substantial rather than

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strongly suggests the *pro forma* character of the proceeding. However, since the evidence establishing petitioner's violations of Section 2314 had previously been presented several times to other grand juries, it is quite understandable that the Norfolk proceeding was conducted expeditiously. In any event, the presumption of regularity of federal grand jury proceedings cannot be overcome on the basis of an unsubstantiated allegation such as petitioner's. *United States* v. *Johnson*, 319 U.S. 503, 513.

speculative."[11] When considered in the context of the entire charge (*United States* v. *Park*, 421 U.S. 658, 674), however, the instruction "correctly conveyed the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U.S. 121, 140. The context makes clear that the district court used the word "substantial" to mean "real" or "nonspeculative" rather than "of great magnitude," as petitioner's argument implies. See *Coffin* v. *United States*, 156 U.S. 432, 453.

A trial judge has broad discretion to assist the jury in understanding the terms used in the charge, and he must be given appropriate latitude in his choice of the best way to do so. *Holland* v. *United States, supra*, 348 U.S. at 139-140. Although, as petitioner notes, various courts of appeals have cautioned trial judges to avoid the phrase

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[11]The court's charge stated in pertinent part (App. 786a-787a):

> You are told that whenever a defendant comes into court charged with a crime, he is presumed to be innocent.
>
> This presumption is an abiding one. It remains with that defendant throughout the trial, unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.
>
> The burden of proving a defendant guilty beyond a reasonable doubt rests upon the Government.
>
> This burden never shifts throughout the trial.
>
> The law does not require a defendant to prove his innocence or to produce any evidence. If the Government fails to prove a defendant guilty beyond a reasonable doubt, then the jury must acquit him.
>
> I can define reasonable doubt no better than to say that it means a doubt that is based on reason and must be substantial rather than speculative.
>
> It must be sufficient to cause a reasonably prudent person to hesitate to act in the face of it in the more important affairs of his life.

"substantial doubt," they have refused to reverse the conviction where, as here, the charge did not unduly emphasize the word "substantial" and, when viewed as a whole, the instruction on "reasonable doubt" was not subject to misinterpretation. See, *e.g.*, *United States* v. *Crouch*, 528 F. 2d 625 (C.A. 7); *United States* v. *Muckenstrum*, 515 F. 2d 568 (C.A. 5), certiorari denied, 423 U.S. 1032; *United States* v. *Fallen*, 498 F. 2d 172 (C.A. 8). Moreover, to the extent that there is a conflict among various panels of the Seventh Circuit on this issue, the conflict should be resolved by that court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.

b. Petitioner claims (Pet. 16-17) that the district court's charge amounted to a "virtual instruction to the jury that petitioner had caused the transfer of stock in interstate commerce."

At the inception of the charge, the trial judge told the jurors that they were the sole judges of the facts (App. 772a). Before instructing on the elements of an offense under 18 U.S.C. 2314, the judge then stated (App. 791a), "I'd like to comment briefly on the evidence, and because my comment is based on my recollection of the evidence, and since it is your recollection that counts and is controlling, you are free to disregard the comment in its entirety." The judge proceeded to tell the jury that the government was required to prove the element of interstate transportation in both counts of the indictment beyond a reasonable doubt and to observe that the weight of the evidence indicated that there had been actual physical movement of the stock certificates and cashier's check between Virginia and Pennsylvania and that that movement had been contemplated by petitioner (App. 792a). Petitioner argues that these comments were improper because the government failed to establish by "direct evidence" a nexus between him and the transportation of the stock certificates.

The longstanding rule in the federal courts is that a trial judge may comment on the evidence so long as he does so fairly and he clearly states that the jury is the ultimate fact-finder and should rely upon its own memory and understanding of the facts. *Quercia* v. *United States*, 289 U.S. 466, 469. Cf. *Horning* v. *District of Columbia*, 254 U.S. 135, 138. The judge's comments in this case were not erroneous, because he charged the jury on each element of the offense and reminded the jury repeatedly that each element had to be proven beyond a reasonable doubt. Moreover, when the judge gave his view that the interstate movement of the securities had been contemplated by petitioner, he qualified his remarks by stating that the jury was bound by its own recollection of the evidence and that it was free to disregard his comment in its entirety. Finally, and most important, petitioner's claim of prejudice is illusory, since he did not contest the movement of the securities or cashier's check in interstate commerce.[12] Petitioner's theory throughout trial was not that the McShain transactions alleged by the government did not occur, or even that he was unaware of them, but that they were completely legal. Hence, the judge's comment on the undisputed evidence was a proper exercise of his discretion to focus the issues for the jury.

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[12]See *United States* v. *Natale*, 526 F. 2d 1160 (C.A. 2), certiorari denied, 425 U.S. 950, where the trial judge remarked in his charge to the jury that he did not "think" that there was any dispute over two elements of the offense. Although the defendant argued that this was in effect a directed verdict for the government on two elements of the offense, the court of appeals disagreed, noting that the judge had properly charged each element of the offense to the jury and that his comments on the evidence were not unfair because there had been no dispute over those elements at trial. 526 F. 2d at 1167. Petitioner argues that the proof in this case was disputed because there was no "direct evidence" that he personally transported the securities and check in interstate commerce. However, that is not a requirement of Section 2314. *Pereira* v. *United States*, 347 U.S. 1, 8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.